Supreme Court, U.S.
FILED
JUL 20 1998
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No. 97-1973

In The

Supreme Court of the United States

October Term, 1997

CHERYL D. CHRISTOPHER,

Petitioner,

vs.

ADAM'S MARK HOTELS, a Division of HBE Corporation,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eight Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONSE TO PETITIONER'S QUESTIONS PRESENTED

The questions presented by Petitioner do not accurately reflect the issues in this case. Specifically, Petitioner overstates the issues in hopes of creating some reason for this Court to grant review. Concisely stated, the only issue properly raised in this case is as follows:

I. Whether the Eighth Circuit articulated and applied the appropriate legal standard in determining that Petitioner's evidence was insufficient to survive a motion for summary judgment.

STATEMENT PURSUANT TO RULE 29.6

HBE Corporation is the parent company of Respondent and Respondent has no nonwholly owned subsidiaries.

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STATEMENT OF THE CASE

A. Nature of the Case and Procedural Background

Petitioner Cheryl Christopher ("Christopher") sued Respondent Adam's Mark Hotels ("Adam's Mark") seeking damages for employment discrimination in violation of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 *et seq.* Adam's Mark moved for summary judgment asserting, *inter alia,* that Christopher was discharged for legitimate, nondiscriminatory reasons. The District Court found that Adam's Mark proffered a legitimate, nondiscriminatory reason for Christopher's discharge, and concluded that Christopher's evidence was insufficient to raise a genuine issue of fact as to pretext or intentional discrimination. On March 5, 1998 the District Court entered its Order granting summary judgment in favor of Adam's Mark on Christopher's discrimination claim.

Christopher appealed to the Eighth Circuit, and the Court of Appeals affirmed summary judgment in favor of Adam's Mark. The Eighth Circuit reviewed *de novo* the District Court's decision to grant summary judgment, found that Christopher had failed to create a submissible case of pretext, and agreed with the District Court that Christopher's evidence was insufficient for a reasonable trier of fact to infer discrimination. Christopher now attempts to appeal from the Eighth Circuit's decision affirming the order of the District Court granting summary judgment in favor of Adam's Mark.

B. Statement of Facts

Christopher applied for a sales secretary position at Adam's Mark in Kansas City, Missouri on May 10, 1995. She submitted a resume and employment application indicating that she

possessed a Master's Degree in Computer Science, that she was highly skilled and experienced in the use of Wordperfect (the word processing program utilized at Adam's Mark), and that she had taught Wordperfect at the college level. Christopher was interviewed the same day she applied but did not identify herself as an individual with a disability at the time. She was hired that day for the position.

Christopher reported for work the next day, May 11, 1995. Christopher took part in Adam's Mark's orientation program, at which she was asked to complete several forms. One of the forms was a Supplemental Information Form, which contained questions about medical condition and history. In response, Christopher wrote that she had experienced a bipolar breakdown and that she had been hospitalized for bipolar dysfunction. The supplemental form was placed in Christopher's personnel file in accordance with company procedures.

After orientation, Christopher reported to the sales department where she began on-the-job training with Lisa Lambertson, the sales secretary Christopher was to replace. The training was to consist of Lambertson working side-by-side with Christopher, providing computer instruction. This was the same training received by previous secretaries. In addition, Lambertson told Christopher that Wordperfect tutorials and computer manuals were available for her use, and reminded Christopher there was a template above the function keys explaining their usage.

On Christopher's first day in the sales office, Christopher admitted to Lambertson that she was not familiar with the Wordperfect function keys. When asked to execute a merge and set up a banner using Wordperfect, Christopher indicated she did not know how to perform these tasks. Christopher struggled with locating and opening documents, saving documents, and

closing documents. At one point during Christopher's training, Ann Windsor, Christopher's immediate supervisor, pulled up a blank form for Christopher to work on. Christopher told Windsor that the form was difficult to use and that one of her first priorities would be to change the office system. Christopher admitted in her deposition that she acted combatively during her brief employment at Adam's Mark.

A few days after Christopher's employment began, Windsor recommended that Christopher be terminated. Some time after Christopher's orientation but before her termination, Windsor reviewed Christopher's personnel file. Based upon Windsor's recommendation, Don Russell, Director of Human Resources, agreed that Christopher should be terminated. It was Russell's practice to review employees' files prior to terminating them. On May 17, 1995, Russell terminated Christopher.

REASONS FOR DENYING THE WRIT

I.

CHRISTOPHER HAS FAILED TO ESTABLISH SUFFICIENT GROUNDS FOR CERTIORARI UNDER THE SUPREME COURT'S RULES.

Christopher has failed to demonstrate that this case is exceptional such that it merits the review of the Supreme Court. Supreme Court Rule 10 states that, "[a] petition for a writ of certiorari will be granted only for compelling reasons." Rule 10 further sets forth those circumstances under which certiorari may be proper. *Id.* Not only has Christopher failed to identify any such circumstances in support of her request for certiorari, she also has failed to set forth any compelling reasons that militate in favor of the granting of certiorari. Indeed, Christopher merely points to a phantom split of authority among the circuit courts of appeals. Accordingly, certiorari must be denied.

A. This Case Does Not Involve a Split of Authority Among the Circuits

Christopher's argument that this case involves a split of authority among the United States courts of appeals is erroneous. Under Supreme Court Rule 10, certiorari may be considered where "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." Sup. Ct. R. 10(a).

The type of conflict required between circuit courts is a direct conflict regarding a specific issue of law. *See, e.g., Jaffee v. Redmond*, 518 U.S. 1 (1996) (certiorari granted to resolve conflict between several Circuits regarding whether federal courts should recognize a psychotherapist-patient privilege under the federal Rules of Evidence); *Bingler v. Johnson*, 394 U.S. 741, 747-48 (1969) (certiorari granted to resolve conflict between Third Circuit's ruling and ruling by Fifth Circuit regarding validity of a treasury regulation); *United States v. Malloy*, 383 U.S. 627, 630-31 (1966) (certiorari granted to resolve conflict between Seventh Circuit's decision and a previous ruling by the First Circuit regarding whether to exclude from a taxable estate the portion of the trust principal representing accumulated income and order an appropriate refund); *Braxton v. United States*, 500 U.S. 344, 347 (1991) (certiorari granted to resolve conflict between the Fourth Circuit's decision below and that of the Second and Fifth Circuits regarding whether a "stipulation" in a plea agreement must be part of the "quid pro quo" for the government's agreement not to charge a higher offense). This case simply does not present any decision by the Eighth Circuit that is in direct (or even indirect) conflict with any other circuit on the specific issues involved.

1. *The Eighth Circuit Articulated And Applied The Proper Standard In Determining That Christopher's Evidence Was Insufficient For A Reasonable Trier Of Fact To Infer Discrimination.*

The standard of review for summary judgment motions is well established. The Federal Rules of Civil Procedure provide that when a party moves for summary judgment:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, show that there is no genuine issue as to a material fact and the moving party is entitled to judgment as a matter of law.

Fed. R. Civ. P. 56(c). Any inferences to be drawn from the facts must be viewed in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The nonmoving party may not "rest on mere allegations or denials" but must demonstrate on the record the existence specific facts which create a genuine issue for trial. Fed. R. Civ. P. 56(e). Such an issue exists and summary judgment must be denied if on the record then before it the court determines that there will be sufficient evidence for a jury to return a verdict in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) this Court set forth the analytical framework of burden shifting used by courts to determine whether a plaintiff can establish a claim of employment discrimination based upon circumstantial evidence. First, the plaintiff must establish a *prima facie* case of discrimination. *Id.* at 802. After a plaintiff establishes a *prima facie* case, the burden shifts to the employer to articulate some legitimate, nondiscriminatory reason for its actions. *Id.* Then, in order to prevail, the plaintiff must show

that the employer's stated reason was in fact pretextual. *Id.* at 804. A showing of pretext requires proof that the employer's articulated reason for the adverse employment action was false, and that discrimination was the real reason. *St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 515 (1993). The plaintiff retains at all times the burden of persuading the trier of fact that the adverse employment action was motivated by intentional discrimination. *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 253 (1981).

This Court, in *St. Mary's Honor Center v. Hicks, supra,* emphasized that once an employment discrimination case reaches the third stage of the *McDonnell Douglas* analytical framework, it is to be treated like any other case. Trial courts or reviewing courts should not "treat discrimination differently from other ultimate questions of fact." *Hicks,* 509 U.S. 502, 524 (quoting *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716). In the third and final stage, a plaintiff must establish the existence of sufficient facts which if proven at trial would permit a jury to conclude that the defendant's proffered reason is pretextual and that intentional discrimination is the true reason for the defendant's actions. *Hicks,* 509 U.S. at 507-508. Thus, at the third stage of the *McDonnell Douglas* analysis, the issue of discrimination can be considered under this Court's standard governing motions for summary judgment. Specifically, summary judgment is proper in a discrimination case when a plaintiff's evidence is insufficient to raise a genuine issue of material fact as to pretext or intentional discrimination.

The Eighth Circuit follows this court's ruling in *Hicks. See Rothmeier v. Investment Advisors, Inc.*, 85 F.3d 1328, 1334 (8th Cir. 1996) (quoting *Hicks,* 509 U.S. at 515, stating that "a reason cannot be proved to be a '*pretext for discrimination*' unless it is shown *both* that the reason was false, *and* that discrimination was the real reason."). Here, the Eighth Circuit

found that Christopher failed to create a submissible case as to pretext, and "Christopher's evidence is insufficient for a reasonable trier of fact to infer discrimination." [Pet. App. at A-14].[1] As this Court has stated, "[w]here the record as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial' ", *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986), and summary judgment must be granted.

In this case, the Eighth Circuit applied the *McDonnell Douglas* analysis to Christopher's claim. Viewing the evidence in the light most favorable to Christopher, the Court assumed that she had established a *prima facie* case. The Court then shifted the burden to Adam's Mark to articulate legitimate, nondiscriminatory reasons for Christopher's discharge. The Eighth Circuit found that Adam's Mark proffered legitimate, nondiscriminatory reasons for its actions; specifically, that Christopher lacked the skills she represented on her resume; that she was unable or unwilling to learn the duties of her job; and that Christopher was combative, resentful, and resistant towards her supervisors and co-workers. Having found that Adam's Mark rebutted the presumption of discrimination raised by Christopher's *prima facie* case, the Court shifted the burden back to Christopher to demonstrate that Adam's Mark's reasons were a pretext for discrimination. Again, viewing the evidence in the light most favorable to Christopher, the Court found that Christopher's evidence was insufficient for a reasonable trier of fact to infer discrimination. In short, the Eighth Circuit analyzed Christopher's evidence under *McDonnell Douglas*, and found Christopher's evidence insufficient to withstand summary judgment. There is no evidence that in the present case, the Eighth Circuit applied any standard different from those set forth by this Court.

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1. Cites to "Pet. App." refer to the appendix filed with the Petition to this Court.

Christopher argues that by affirming summary judgment in favor of the employer, the Eighth Circuit improperly allowed the trial court to

> weigh the credibility of witnesses and to decide what inferences are reasonable or unreasonable . . . [e]ssentially, the trial judge became the finder of fact in place of the jury.

[Petition at 8]. Christopher essentially argues that summary judgment is improper once a *prima facie* case of discrimination has been established. The Eighth Circuit recognized that a cautionary approach must be taken in examining the propriety of summary judgment in discrimination cases, stating:

> We proceed with caution when deciding whether summary judgment is appropriate en employment cases because intent is usually a central issue. *See Gill v. Reorganized Sch. Dist. R-6, Festus, Mo.*, 32 F.3d 376, 378 (8th Cir. 1994). This cautionary approach, however, "cannot and should not be construed to exempt" from summary judgment employment cases involving intent. *Krenik v. County of Le Sueur*, 47 F.3d 953, 959 (8th Cir. 1995). If there is no genuine issue about the employer's discriminatory intent, to the extent intent is material, then summary judgment may be appropriate.

[Pet. App. at A-6]. The Eighth Circuit recognized that great care must be exercised in granting summary judgment in employment discrimination cases; however, when no genuine issue of material fact exists, summary judgment is appropriate.

The standards for reviewing summary judgment in discrimination cases are well established. When a plaintiff's

evidence is insufficient for a reasonable trier of fact to infer discrimination, summary judgment must be granted. The Eighth Circuit reviewed the evidence in the light most favorable to Christopher, gave her the benefit of all reasonable inferences, and found her evidence insufficient to survive summary judgment. Having failed to produce sufficient evidence to satisfy the District Court and Court of Appeals, Christopher now seeks further review by this Court.

The Eighth Circuit articulated and applied the proper standard in determining that Christopher's evidence was insufficient to withstand summary judgment. Supreme Court Rule 10 states that "[a] petition for writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." Sup. Ct. R. 10. As Justice Stewart once wrote:

> The only remarkable thing about this case is its presence in this Court. For the case involves no more than the application of well-settled principles to a familiar situation, and has little significance except for the [parties].

Butz v. Glover Livestock Comm'n Co., 411 U.S. 182, 189 (1973) (dissenting opinion). This admonition is particularly applicable to the present case. This case presents no special or important reason for this Court to accept review.

2. *The Other Circuit Courts Apply The Same Standard As The Eighth Circuit To Summary Judgment In Employment Discrimination Cases.*

Christopher points to cases from other circuits in an attempt to establish a split of authority among the circuits regarding the standard for summary judgment in an employment

discrimination case. However, each of the cases cited by Christopher apply the same standard used by the Eighth Circuit when evaluating the propriety of summary judgment in discrimination cases.

First, Christopher cites to *Aka v. Washington Hospital Center,* 116 F.3d 876 (D.C. Cir. 1997), for the proposition that a majority of the Circuits have adopted a "different standard, which if applied to the facts of the instant case, could well have produced a different result." [Petition at 8]. Initially, Christopher notes that the D.C. Circuit believes an added measure of rigor or caution is appropriate in ruling on summary judgment, because an employer's intent is at issue. The Eighth Circuit does not disagree. The D.C. Circuit's cautionary statement echoes the Eighth Circuit's own statement, articulated by the court below, that

> [w]e proceed with caution when deciding whether summary judgment is appropriate in employment discrimination cases because intent is usually a central issue.

Pet. App. A-6, citing *Gill v. Reorganized Sch. Dist. R-6, Festus, Mo.,* 32 F.2d 376, 378 (8th Cir. 1994). Christopher identifies the "different standard" set forth by the D.C. Circuit as follows:

> . . . the fact finder's disbelief of the reasons put forward by the defendant (particularly if the disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the *prima facie* case, suffice to show intentional discrimination.

[Petition at 8]. Rather than a different standard applied by the D.C. Circuit, the above language is the frequently quoted language of this Court in *Hicks,* 509 U.S. at 510-11. This is

the same standard articulated and applied by the Eighth Circuit. As Christopher points out, the Eighth Circuit based its opinion on *Rothmeier v. Investment Advisors, Inc.*, 85 F.3d 1328, 1335 (8th Cir. 1996). In reality, the "*Rothmeier* standard" is the Eighth Circuit's straightforward application of *Hicks*. In *Rothmeier*, the Eighth Circuit explains its application of the rule of law stated in *Hicks* as follows:

> The Court thus struck a middle ground in *Hicks*, refusing to adopt either pretext-only or pretext-plus as the exclusive test for sufficiency of evidence in employment-discrimination cases. Instead, the test fashioned by the Court for the third stage of the *McDonnell Douglas* analysis is more fact sensitive: whether the employee has provided evidence from which a reasonable factfinder could conclude that the employer intentionally discriminated against the employee for a prohibited reason.

Rothmeier, 85 F.3d at 1334, citing *Hicks*, 509 U.S. at 510-11.

Christopher argues that the *Rothmeier* standard *incorrectly* requires a plaintiff to produce sufficient evidence for a jury to disbelieve the reasons proffered by the employer. [Petition at 7-8]. Far from incorrect, this is the explicit requirement stated by this Court in *Hicks*: a discrimination plaintiff must prove both that the employer's articulated reason is false, and that discrimination was the real reason for a challenged employment action. *Hicks*, 509 U.S. at 515. Calling the *Rothmeier* standard a different standard than that applied by other circuits is merely a disingenuous attempt to avoid this Court's decision in *Hicks*. The *Rothmeier* standard is, in fact, the *Hicks* standard.

Next, without discussion,[2] Christopher cites cases from the Third, Fourth, Seventh, Ninth, Tenth, and Eleventh Circuits for the proposition that a split of authority in the Circuits could well have produced a different result if applied to the facts of the present case. [Petition at 8]. First, Christopher cites *Krouse v. American Sterilizer, Inc.*, 126 F.3d 494 (3rd Cir. 1997) in support of this erroneous proposition. However, Christopher's failure to produce sufficient evidence of pretext would have warranted summary judgment in the Third Circuit, as it did in the Eighth Circuit. As the Third Circuit states in *Krouse*:

> In order to survive summary judgment in a pretext case, the plaintiff must produce "sufficient evidence to raise a genuine issue of fact as to whether the employer's proffered reasons were not the true reasons for the challenged employment action."

126 F.3d at 504, quoting *Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1067 (10th Cir. 1996) (en banc). *Krouse*, like *Rothmeier* in the Eighth Circuit, is the Tenth Circuit's application of *Hicks* in the context of summary judgment. 126 F.3d at 501. Applying the analysis of *Krouse* to the present case would not change the result; as in the Eighth Circuit, a discrimination plaintiff in the Tenth Circuit must produce sufficient evidence of discrimination in order to survive summary judgment.

Christopher also cites the Fourth Circuit's decision in *Burns v. AAF-McQuay, Inc.*, 96 F.3d 728 (4th Cir. 1996), in her attempt to establish a split of authority. However, the Fourth Circuit also applies the same standard as the Eighth Circuit in analyzing the propriety of summary judgment in a discrimination case:

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2. Christopher offers no discussion of any of the remaining cases she cites for the proposition that a split of authority exists between the Eighth Circuit and six other circuits. [Petition at 9-11].

> To withstand summary judgment, [a claimant] must produce direct or circumstantial evidence "of a stated purpose to discriminate [on the basis of age] of sufficient probative force to reflect a genuine issue of material fact." *[EEOC v.] Clay Printing*, 955 F.2d [936], 941 (4th Cir. 1992) (quoting *Goldberg v. B. Green & Co., Inc.*, 836 F.2d 845, 848 (4th Cir. 1988)).

Burns, 96 F.3d at 732, quoting *Henson v. Liggett Group, Inc.*, 61 F.3d 270, 275 (4th Cir. 1995). Christopher's evidence was insufficient to reflect a genuine issue of material fact as to pretext or discrimination. Under *Burns*, the insufficiency of Christopher's evidence would have mandated summary judgment, had her claim arisen in the Fourth Circuit.

Turning to the Seventh and Ninth Circuits, Christopher cites *O'Connor v. DePaul University*, 123 F.3d 665 (7th Cir. 1997) and *Schnidrig v. Columbia Machine, Inc.*, 80 F.3d 1406 (9th Cir. 1996). Like the Eighth Circuit, the Seventh Circuit holds that a discrimination plaintiff can survive summary judgment only by "producing evidence . . . from which a rational factfinder could infer . . . discrimination." *O'Connor*, 123 F.3d at 670. Similarly, the Ninth Circuit holds that summary judgment is appropriate unless the plaintiff produces "sufficient evidence to raise a genuine issue of fact as to whether [the employer's] proffered reasons were pretextual." *Schnidrig*, 80 F.3d at 1410. Had Christopher's claim arose in the Seventh Circuit, summary judgment would have been mandated under *O'Connor*, had her claim arisen in the Ninth Circuit, summary judgment would have been proper under *Schnidrig*.

The same conclusion results from an examination of the Tenth and Eleventh Circuit cases cited by Christopher. The Tenth Circuit, in *Randle v. City of Aurora*, 69 F.3d 441 (10th Cir. 1995) states:

> At the summary judgment stage, it then becomes the plaintiff's burden to show that there is a genuine issue of material fact as to whether the employer's proffered reason for the challenged action is pretextual—i.e. unworthy of belief.

69 F.3d at 451.[3] The Eleventh Circuit In *Jameson v. Arrow Co.*, 75 F.3d 1528 (1996) states:

> In an employment discrimination case, the plaintiff must produce sufficient evidence to support an inference that the defendant employer based its employment decision on an illegal criterion. . . . [T]he function of the court on a summary judgment motion is to determine whether the proffered admissible evidence shows circumstances that would be sufficient to permit a rational trier of fact to infer a discriminatory motive. . . .

75 F.3d at 1531, n.1. These standards are no different than the standard applied by the Eighth Circuit. Christopher's evidence was insufficient to raise a genuine issue of material fact as to pretext or intentional discrimination. Summary judgment would have been affirmed in each of these circuits.

Christopher's argument that other circuits apply a different summary judgment standard than the Eighth Circuit applies to employment discrimination cases is erroneous. The Eighth Circuit's finding that Christopher's evidence was insufficient for a reasonable factfinder to infer pretext or intentional discrimination would have resulted in summary judgment in

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3. The *Randle* court repeats the above explanation, in simpler language, stating that "[t]he defendant would also be entitled to summary judgment if plaintiff could not offer evidence tending to show the defendant 's innocent explanation for his employment decision was false." 69 F.3d at 451, n.14.

each of the circuits cited by Christopher. None of the cases cited by Christopher establish a split of authority among the circuit courts.

B. Absent a Split of Authority Among the Circuits, There Exists No Reason For This Court to Grant Christopher's Petition.

In light of Supreme Court Rule 10 and its guidelines for determining where certiorari is appropriate, there is no reason for this court to hear this case absent a split of authority among the circuits. This case presents no split of authority on any issue between the Eighth Circuit and other circuits, nor does it present any important question of federal law that has not been, but should be, settled by this Court. The circuits are uniformly and consistently applying the correct legal standard to determine when summary judgment is proper in employment discrimination cases. This case presents no special or important reason for this Court to accept review under Rule 10.

CONCLUSION

For each of the reasons set forth in Adam's Mark's brief, this Court should deny Christopher's Petition for Writ of Certiorari.

Respectfully submitted,

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